In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-680

EDMUND J. OLSEN,
Petitioner,

vs.

PEOPLE OF THE TERRITORY OF GUAM,
Respondent.

BRIEF IN OPPOSITION
to
Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

KENNETH E. NORTH
Attorney General
Post Office Box DA
Agana, Guam 96910
Attorney for Respondent

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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QUESTIONS PRESENTED

Whether the Ninth Circuit has jurisdiction to entertain appeals by the government of Guam from the district court of Guam in criminal cases.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts

of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

United States Code, Title 48:

§ *1424. District Court—Other courts—Jurisdiction*

(a) There is hereby created a court of record to be designated the "District Court of Guam," and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine. The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam. Appeals to the District Court of Guam shall be heard and determined by an appellate division of the court consisting of three judges, of whom two shall constitute a quorum. The judge appointed for the court by the President shall be the presiding judge of the appellate division and shall preside therein unless disqualified or otherwise unable to act. The other judges who are to sit in the appellate division at any session shall be designated by the presiding judge from among the judges assigned to the court from time to time pursuant to section 24(a) of this

Act. That concurrence of two judges shall be necessary to any decision by the District Court of Guam on the merits of an appeal but the presiding judge alone may make any appropriate orders with respect to an appeal prior to the hearing and determination thereof on the merits and may dismiss an appeal for want of jurisdiction or failure to take or prosecute it in accordance with the applicable law or rules of procedure.

Penal Code of Guam:

§ *1238. In what cases by the government*

An appeal may be taken by the government:

1. From an order setting aside the information;

2. From a judgment for the defendant on a demurrer to the accusation or information;

3. From an order granting a new trial;

4. From an order arresting judgment;

5. From an order made after judgment, affecting the substantial rights of the government.

The Criminal Procedure Code of Guam—1977

§ 65.15. Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following shall be raised prior to trial:

(a) Defenses and objections based on defects in the institution of the prosecution;

(b) Defenses and objections based on defects in the indictment, information or complaint (other than that it fails to show jurisdiction in the court or to charge an

offense which objections shall be noticed by the court at any time during the pendency of the proceedings);

(c) Motions to suppress evidence;

(d) Requests for discovery pursuant to Chapter 70 (commencing with Section 70.10); or

(e) Requests for a severance of charges or defendants pursuant to Section 65.35.

§ 65.17. (a) Prior to trial, a party may apply for review of an adverse ruling made pursuant to subsections (a) through (c) of Section 65.15 by means of a petition for writ of mandate or prohibition unless the court, prior to the time review is sought, has dismissed the criminal action.

(b) A defendant may seek review of any ruling by the trial court pursuant to subsection (c) of Section 65.15 on appeal from conviction whether or not he has previously sought or obtained review of such ruling and notwithstanding the fact that the judgment of conviction is based upon a plea of guilty or nolo contendere.

STATEMENT OF THE CASE

The Respondent adopts Part I of the opinion of the Court of Appeals for the Ninth Circuit below as its statement of the case adding that, as the Petitioner pointed out in his statement of the case, his petition for rehearing en banc was denied. The full text of that opinion is attached as Appendix A.

REASONS FOR DENYING THE WRIT

(1) There Is No Conflict Between the Third Circuit and the Ninth Circuit Regarding the Scope of 28 U.S.C., § 1291; Both Courts Agree There Must Be "Express Statutory Authority" Granting the Right to Appeal in a Criminal Case.

Olsen's motion to dismiss the People's appeal in this case is based upon his assertion that the Government must utilize 28 U.S.C. § 1291 to demonstrate a right to appeal, but that the Government's attempt must fail because prior cases have determined that Section 1291, standing alone, does not give the prosecution such authority. Although the Virgin Islands Government argued that § 1291 gave it the right to appeal criminal cases in *Government of the Virgin Islands v. Hamilton,* 475 F.2d 529 (3rd Cir., 1973), such was not the argument of the Government of Guam in the present case, nor was it the reasoning of the Ninth Circuit. *People v. Olsen,* No. 79-1001 (9th Cir., 1979).

Section 1291 states in part that "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of . . . the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." The statute "is the general, basic grant of jurisdiction to Courts of Appeals to review by appeal the decisions of district courts. It incorporates the historic federal rule that a judgment must be final to be appealable." 9 *Moore's Federal Practice* ¶ 110.01 at 47.

Although Section 1291 speaks in terms of "all final decisions", the federal courts have historically insisted that appeals by the Government must rest upon specific statutory authority independent of Section 1291.

> "The history [of federal appellate jurisdiction] shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress, and after that a close restriction of its uses to those authorized by statute." *Carroll vs. United States,* 354 U.S. 394, 400 (1957).

Hence, both the Third Circuit[1] and the Ninth Circuit[2] have rejected the argument that reliance upon the general jurisdictional grant of 28 U.S.C. § 1291 is sufficient authority for an appeal by the Government in a criminal case.

(2) The "Express Statutory Authority" That Must Exist if the Government is to Appeal in a Criminal Case is the Right to Appeal From the Trial Court to the Appellate Court. It Need Not Be Expressly Reaffirmed by Statute at Each Appellate Step. The Opinions of the Court of Appeals for the Ninth Circuit and the Third Circuit Indicate No Disagreement on This Issue.

Although Section 1291 establishes the scope of the jurisdiction of Courts of Appeals, it does not assign the various federally-created district courts to a particular Circuit Court of Appeal. Such an assignment is provided in Title 28 U.S.C. Section 1294. That section establishes that "appeals from reviewable decisions" of the District Court of Guam are to be appealed to the Courts of Appeals for the Ninth Circuit. Likewise, that section establishes that appeals arising out of the District Court of the Virgin Islands are to be appealed to the Court of Appeals for the Third

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[1] *Government of the Virgin Islands v. Hamilton,* 475 F.2d 529 (3rd Cir., 1973).

[2] *Umbriaco v. United States,* 258 F.2d 625 (9th Cir., 1958).

Circuit. Appeals are "reviewable" if inter alia, they qualify as final decisions under Section 1291 of Title 28, and in the case of an appeal by the government there is express statutory authority for the appeal.

It is at this particular point that Olsen's reliance on *Hamilton* is misplaced. The Third Circuit correctly held "that the right of the Government of the Virgin Islands to appeal from a final decision of the district court on appeal from the municipal court in a criminal case must . . . have express statutory authority." *Hamilton* at 541. The *Hamilton* court noted that not only was there no statute granting the Virgin Islands government the right to appeal, but additionally that the Virgin Islands Code expressly gave only the defendant the right to appeal in a criminal case.

While the Virgin Islands legislature has conferred the right of appeal only upon criminal defendants and not upon the Government, the Guam Legislature has expressly granted the right of appeal to the Government in certain cases. Guam Penal Code Section 1238. Petitioner argues, however, that not only must there be express statutory authority to appeal to the District Court of Guam but additionally there must be express statutory authority to appeal from the District Court to the Circuit Court. Otherwise, the decision is not "reviewable" under 28 U.S.C. § 1294. The Third Circuit found similar reasoning unpersuasive with respect to the District Court of the Virgin Islands.

> "[I]n 1948 when the Congress enacted Section 1291 it knew that among the final decisions which the District Court [of the Virgin Islands] was then empowered to render were decisions in appeals from the inferior courts of the Virgin Islands. If, because such

cases had already been subject to one appeal or for any other reason, the Congress did not wish them to be further appealable to this court it could, and we think would, have said so expressly by inserting qualifying language in Section 1291. Not having done so we must take the phrase 'all final decisions of * * * District Court of the Virgin Islands' to mean what it plainly says, that all final decisions of the Court in every type of case are within our appellate jurisdiction and not merely those entered by the District Court in the exercise of its original jurisdiction. In *Government of the Virgin Islands vs. Ferrer,* 1960, 3 Cir., 275 F.2d 497, [a criminal appeal] we exercised such jurisdiction without question and, having now considered the question, we uphold the jurisdiction then and now being exercised by us." *Southerland vs. Saint Croix Taxicab Association,* 315 F.2d 364, 367 (3rd Cir. 1963). (deletion in original).

The *Southerland* rationale could not be more on point. The Organic Act of Guam, 64 Stat. 384 [48 U.S.C. § 1421, et seq.] was passed by Congress in 1950. Section 22(a) of that Act created the District Court of Guam. Section 23(a) gave the Court of Appeals of the Ninth Court jurisdiction over certain final decisions of that Court. The same Act provided that the Guam Legislature would determine the District Court's appellate jurisdiction. The Organic Act of Guam, 64 Stat. 389-390.

In 1951, Congress repealed Section 23(a) of the Organic Act and amended 28 U.S.C. § 1291 so that "all final decisions" of the District Court of Guam could be appealed to the Ninth Circuit. Public Law 248, section 48, 65 Stat. 726. "Final decisions", of course, can be rendered whether the

District Court of Guam is exercising its appellate jurisdiction or its original jurisdiction.

To paraphrase *Southerland,* in 1951 when the Congress amended Section 1291, it knew that among the final decisions which the District Court of Guam was then empowered to render were decisions in appeals from the inferior courts of Guam. Since Congress did not expressly insert qualifying language in Section 1291 the phrase "all final decisions of * * * the District Court of Guam" must mean what it plainly says, that all final decisions of the Court in every type of case are within the appellate jurisdiction of the Court of Appeals for the Ninth Circuit.

Petitioner objected to the Ninth Circuit's reliance upon *Southerland* because *Southerland* was a civil not a criminal case. Classifying the case as civil does not affect its logic. Indeed, *Southerland's* reference to the *Ferrer* case expressly applied the reasoning to both civil and criminal appeals. In view of the language of Section 1291, such a position is inescapable. Surely Olsen would not argue that criminal defendants have no right to appeal from an adverse District Court decision. The fact that the Government is the appellant in the criminal case merely adds an additional hurdle: the Government must expressly be given the authority to appeal independent of the language of Section 1291. That is why it was held in this Petitioner's case that "once the authority to appeal is granted, Section 1291 does give jurisdiction for appeals from a territorial District Court appellate decision reviewing an inferior court." *People v. Olsen,* supra.

Petitioner, of course, insists that this statutory authority is a nullity because the right to appeal by the Government was a right conferred by a Territorial legislature and the "courts of appeals jurisdiction over district court decisions must, as appellee points out, be granted by Congress." *Corn v. Guam Coral Co.,* 318 F.2d 622, 627 (9th Cir., 1963). Such an argument ignores the fact that Congress has expressly delegated the responsibility to determine the appellate jurisdiction of the District Court of Guam to the Guam Legislature.[3] Because the Guam Legislature was acting pursuant to an express Congressional delegation, it can hardly be said that the Government's right to appeal has merely Territorial roots.

Aside from the issue of statutory construction, it should be noted that while there are important policy reasons to insist there be express statutory authority permitting the Government to appeal from the trial court to an appellate court, there is no policy reason that demands that there be a second express statutory authority to allow the prosecution to appeal from the intermediate appellate court (in this case the District Court of Guam) to the ultimate appellate court (in this case the Ninth Court of Appeals).

In summary, the Guam Legislature has given the Government the right to appeal under specifically enumerated circumstances including ". . . an order made after judgment . . ." Penal Code of Guam § 1238. The Guam Legislature had the authority to grant such a right because of the decision of Congress to have the appellate jurisdiction of

[3]"The District Court of Guam . . . shall have such appellate jurisdiction as the [Guam] legislature may determine." 48 U.S.C. § 1424(a)

the District Court of Guam determined by the Guam Legislature. 48 U.S.C. § 1424(a). Once the right to appeal has been granted to the Government in a Congressionally-sanctioned manner, there is no reason to believe that the right to appeal is only to the first appellate level. *Virgin Islands v. Hamilton,* supra, is not authority to the contrary.

(3) The Ninth Circuit's Opinion in this Case Neither Creates Jurisdictional Uncertainty Nor Encourages Further Litigation.

As Petitioner's counsel concedes, the Government of Guam has not often been the appellant in a criminal appeal. However, it is hardly surprising that the Government has appealed the District Court decision rendered below[4] which fashioned a remedy for Olsen which, as the Ninth Circuit pointed out, is apparently unparalleled.

Petitioner's fear that the present Criminal and Correctional Code of Guam greatly expands the area of possible governmental appeals is overstated. The interlocutory review which the new code allows simply grants a right to petition the District Court of Guam for a writ of mandate or prohibition. Guam Crim. Pro. Code § 65.17(a). Certainly, both the District Court of Guam and the Ninth Circuit have adequate judicial tools to prevent such an interlocutory review from being misused. E.g., *Bauman v. U.S. District Court,* 557 F.2d 650 (9th Cir., 1977).

Although the jurisdictional argument raised by Olsen has been raised by his counsel in an unrelated case,[5] the

[4]*Guam v. Olsen,* 462 F.Supp. 608 (D.Guam 1978).

[5]Petitioner's Brief at 18.

logic of the Circuit Court's opinion below, coupled with a denial of the petition for rehearing en banc, should lay this issue to rest without the necessity of intervention by this Court.

CONCLUSION

The issue which Petitioner raises has been authoritatively determined by both the Third Circuit and the Ninth Circuit. This court should deny the petition for Writ of Certiorari and remand the case so that the appeal may finally be heard on the merits.

Dated this 9th day of November, 1979.

Respectfully submitted,

KENNETH E. NORTH
Attorney General
Attorney for Respondent

(Appendix Follows)

APPENDIX A

APPENDIX A

United States Court of Appeals
for the Ninth Circuit

The People of the Territory of Guam, Plaintiff-Appellant, vs. Edmund J. Olsen, Defendant-Appellee.	No. 79-1001

[Filed September 26, 1979]

AMENDED OPINION

Appeal from the District Court of Guam,
Appellate Division

Before: ELY and SNEED, Circuit Judges, and
FITZGERALD*, District Judge

PER CURIAM:

The People of the Territory of Guam appeal from a decision of the District Court of Guam sitting as an appellate court, reversing a jury conviction in the Superior Court of Guam and remanding the case to the trial court with instructions to enter a judgment of acquittal. The district court reversed the conviction due to the failure of the trial court to provide a trial transcript with reasonable promptness. The district court opinion appears at 462 F. Supp. 608 (D. Guam 1978). We note jurisdiction under 28 U.S.C.

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*Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

§ 1291 and reverse and remand to the district for it to consider defendant's appeal.

I. FACTS

This is an old case that, as a result of our action, is destined to live yet a while. It all began on September 11, 1975, when defendant was convicted of burglary in the second degree and other crimes in the Superior Court of Guam. Notice of appeal to the federal district court and to the Supreme Court of Guam was filed October 28, 1975. On March 9, 1976, the district court dismissed the appeal for lack of jurisdiction on the basis of *Agana Bay Development Co. (Hong Kong) Ltd. v. Supreme Court of Guam,* 529 F.2d 952 (9th Cir. 1976), which held that proper appeal from the Superior Court of Guam lay in the Supreme Court of Guam, not in Federal District Court. Defendant then appealed that dismissal and we reversed in *Territory of Guam v. Olsen,* 540 F.2d 1011 (9th Cir. 1976) (en banc), *aff'd,* 431 U.S. 195 (1977). The Supreme Court affirmed on May 23, 1977. Only at that time did it become clear where the defendant's appeal should be heard.

While this skirmishing took place, the trial court on March 22, 1976 granted defendant's motion to appeal in forma pauperis and to be provided with a transcript on appeal. The transcript had not been delivered by March 31, 1978, at which time defendant moved for reversal of his conviction on the grounds of undue delay in the preparation of his transcript. Defendant took no action to secure the transcript pursuant to the March 22, 1976 order while he pursued the appeal of the original district court dismissal. Indeed, he took no action even after May 1977 until his

March 31, 1978 motion to reverse. Two days prior to the hearing on the motion, held May 26, 1978, the transcript finally was delivered. The district court did not reach the merits of defendant's appeal when it issued its opinion reversing the conviction October 20, 1978.

II. JURISDICTION

Appellant [sic] first argues that this court lacks jurisdiction to entertain the Government of Guam's appeal in this case. He properly cites *Virgin Islands v. Hamilton,* 475 F.2d 529 (3d Cir. 1973), for the proposition that 28 U.S.C. § 1291 does not empower the government to appeal. However, once the authority to appeal is granted, section 1291 does give jurisdiction for appeals from a territorial district court appellate decision reviewing an inferior court. *Southerland v. St. Croix Taxicab Association,* 315 F.2d 364 (3d Cir. 1963). *Accord, Sigal v. Three K's Ltd.,* 456 F.2d 1242 (3d Cir. 1972). Section 1238(5) of the Penal Code of Guam (supplanted by § 130.20(3) of the Criminal Procedure Code as of January 1, 1978) provides that authority. It states that the Government of Guam may take an appeal from "an order made after judgment, affecting the substantial rights of the government." Therefore this case is entirely unlike *Virgin Islands v. Hamilton, supra,* in which the court stated:

> The Government, however, does not contend that it has any specific authorization to appeal in such a case, its sole reliance being upon 28 U.S.C. § 1291 . . . . Our conclusion in this case is reinforced by the fact that under the local law of the Virgin Islands the defend-

> ant alone has the right in a criminal case to appeal to the district court from a judgment of the municipal court. 4 V.I.C. § 33.

475 F.2d at 531.

Moreover, the existence of our jurisdiction under 28 U.S.C. § 1921 in this case generates no double jeopardy concerns such as were present in *Virgin Islands v. Hamilton, supra* at 530-31. Our reversal rests not on the evidentiary insufficiency of the defendant-appellee's trial, but rather on an error made by the District Court of Guam while sitting as an appellate court to hear the defendant-appellee's appeal from his conviction. Following our reversal the defendant-appellee is entitled to have his appeal heard precisely as he would have had there been no error. To be so positioned does not amount to being subjected to jeopardy twice. *See, Burks v. United States,* 437 U.S. 1, 15, 98 S.Ct. 2141, 2149 (1978).

III. THE MERITS

The district court relied upon two District of Columbia Court of Appeals decisions in reaching its decision to reverse defendant's conviction: *Holmes v. United States,* 383 F.2d 925 (D.C. Cir. 1967); *Whitt v. United States,* 259 F.2d 158 (D.C. Cir. 1958); *cert. denied,* 359 U.S. 937 (1959). Neither of these cases reached this issue. Moreover, neither case intimated that a reversal could be ordered without a showing of prejudice. In fact, no previous case of which we are aware has applied the sanction here imposed by the district court.

In this case there is no showing on the record of prejudice to the defendant caused by the delay in the trial court's providing him a transcript. The district court's finding that the delay in this case was "inherently prejudicial" is not enough. We believe specific actual prejudice must be shown to have been caused by the delay. We hold, therefore, that the district court abused its discretion here by not requiring a showing of specific actual prejudice to the defendant from the delay in receiving the transcript.

A serious problem with respect to the preparation of trial transcripts in Guam exists. However, resort to the extreme sanction employed by the district court to solve this problem is unwarranted under the circumstances of this case. We do not by our decision foreclose the right of defendant to reinstate the district court reversal upon a showing on remand of specific actual prejudice. Nor do we reject the possibility that at some point a substantial delay may of itself create sufficient prejudice to justify such action. Under the circumstances of this case, however, the district court abused its discretion in reversing appellant's conviction.

REVERSED and REMANDED.